



## MSB-International Journal of Interdisciplinary Research

Associating Researchers; Nourishing Innovation

Peer Reviewed

Vol. 2, Issue 3, March 2024-July 2024

601-610, MSB-IJIR

# Upholding the Abrogation of Article 370: Can It Be Called Another Black Spot-On Indian Judiciary?

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## Abstract

*The paper examines the Modi Government's use of majoritarian authority to revoke Article 370 on August 5, 2019, and how that action affected democratic norms and the constitution. In line with the BJP's long-standing aim, the abrogation targeted the Muslim-majority state of Jammu and Kashmir and violated fundamental rights on freedom of religion. It examines the historical background of Jammu and Kashmir's post-partition accession to India and the part played by political parties in the abrogation. The constitutional legality of legal measures, such as the division of Jammu and Kashmir into two Union territories, is evaluated. The scope of judicial review, the function of the Legislative Assembly, and the fundamental structural doctrine are all covered in the research that questions the legitimacy of these acts. It also explores the Supreme Court of India's ruling upholding the abrogation's constitutionality, offering insights into the political implications and judicial perspectives.*

**Keywords:** *Supreme Court of India, legal contention, political pressure, constitutional validity, Jammu and Kashmir, Union Government, Article 370, Abrogation, and Fundamental Rights.*

## Introduction

The greatest princely state in India at the time, Jammu and Kashmir, was split into four provinces: Gilgit, Ladakh, Jammu, and Kashmir. Almost 90% of people lived in Jammu and Kashmir, where Muslims made up the majority of the population, under Maharaja Hari Singh's near-dictatorial authority. The 'Hereditary state subject' statute was enacted with the intention of preventing non-state actors from obtaining property or using public services. But certain authorities received an exemption. The BJP government, motivated by its goal of creating a Hindu Rashtra, used unlawful methods to remove Kashmir's special status in defiance of the terms stated in the Instrument of Accession.

A key idea in political philosophy, the Social Contract Theory holds that agreements made between people or between people and their rulers give rise to moral and political obligations. This thesis has been elaborated upon by scholars such as Hobbes, Locke, and Rousseau, who have highlighted how societal agreements gave rise to the state. But in spite of laws and constitutional orders, the governing administration betrayed Kashmiris' confidence.

Jammu and Kashmir have a special place in the political and historical landscape of India. The princely state's Hindu king and majority-Muslim populace are the root of India and Pakistan's territorial dispute<sup>1</sup>. Maharaja Hari Singh became an Indian citizen in 1947 after receiving military support from India during tribal assaults by Pakistan. <sup>2</sup>Article 370 of the Constitution states that the Dominion Legislature was granted limited legislative authority as a result of its accession<sup>3</sup>.

Article 370, which outlined particular provisions, acknowledged Jammu & Kashmir's unique status.

- The legislative power of Parliament is restricted to communications, defense, and foreign policy.
- The state government has to agree to legislation on other issues.
- Presidential orders were required in order to extend other articles of the constitution, frequently with revisions.
- acknowledgement of Jammu and Kashmir's distinct constitution.
- Provision allowing for presidential declarations of abrogation or revision in response to recommendations made by the Constituent Assembly.

### **Historical importance of Jammu and Kashmir and its impact due to such abrogation's**

The Dogra king Maharaja Gulab Singh conquered the province of Jammu & Kashmir in 1846 with the East India Company through the Treaty of Amritsar. Princely states had two options after India gained independence in August 1947: they could either join Pakistan, which was formed as a country with a majority of Muslims, or they could stay independent. There were three states that remained indecisive, including Jammu & Kashmir (J&K). The Home Minister of India, Sardar Vallabhbhai Patel, pushed for the union of these states. In order to keep things as they are, Maharaja Hari Singh of J&K and Pakistan signed a standstill agreement. But when armed tribesmen from Pakistan invaded J&K in October 1947, Hari Singh was forced to turn to India for support. He approved India's Instrument of Accession (IOA), giving it authority over communications, foreign policy, and defense and paving the way for the deployment of Indian troops. The area is still plagued by armed strife today.

On October 26, 1947, following India's independence, Maharaja Hari Singh signed the Instrument of Accession into the Indian Union. Article 306 (later renumbered as Article 370) was adopted by the Parliament on October 17, 1949, granting J&K special status. The process that was impacted by numerous national and international variables culminated in this enactment. J&K was given representation in the Constituent Assembly of India only towards

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<sup>1</sup> V.P. Menon, *Integration of the Indian States*, 109 (1956).

<sup>2</sup> Schedule, Instrument of Accession of Jammu and Kashmir.

<sup>3</sup> Sarvepalli Gopal, *Selected Works of Jawaharlal Nehru: Second Series*, 274 (1987).

the end, although other princely states were represented from the beginning. The topic of J&K's special status is still controversial since Kashmiris see Article 370 as a defense of their identity and autonomy.

The people's will was taken into consideration when J&K was finally admitted to India. A plebiscite under the UNO was promised by Pandit Nehru, but it was never held. J&K was given special status in order to resolve this. In addition, J&K joined India under pressure after Pakistani raiders attacked, unlike other princely states joined voluntarily. J&K is unique in that it did not sign an Instrument of Merger, unlike other states. The Indian Parliament acknowledged the exceptional conditions of J&K by accepting this status. Sardar Patel justified J&K's unique status by highlighting the historical facts of the region. Since then, J&K has continued to be different while preserving its identity and autonomy inside the Indian Union, much like Catalonia does in Spain.

### **The Impugned Legal Measures**

First things first, it is crucial to assess the constitutionality of the legal actions taken to repeal Article 370 and restructure the State of Jammu and Kashmir. The Constitution (Application to Jammu and Kashmir) Order, 2019 (also known as C.O. 272) is the key legislation among these<sup>4</sup>. It was issued by the President in accordance with subclause (d) of clause (1) of Article 370 and allegedly with the "concurrence of the Government of the State of Jammu and Kashmir."<sup>5</sup> But as the state was ruled by the President at the time (as stipulated in Article 356 of the Constitution), the approval purportedly received under C.O. 272 came from the Governor of Jammu and Kashmir, who was speaking for the President. Three key clauses make up C.O. 272:

- It revokes all earlier presidential orders that applied various constitutional clauses to Jammu and Kashmir.
- It covers Jammu and Kashmir under all of the Constitution's provisions, including any changes.
- By replacing "Constituent Assembly of the State" with "Legislative Assembly of the State" in the proviso to clause (3) of Article 370, it modifies Article 367 of the Constitution pertaining to Jammu and Kashmir<sup>6</sup>.

Later, the President issued another notification (known as C.O. 273), stating that Article 370 would no longer be in effect, based on a recommendation from Parliament, which was allegedly acting on behalf of the State's Legislative Assembly under Article 356. This notification included an amended clause requiring that all constitutional provisions apply to Jammu and Kashmir without any modifications or exceptions. In addition, Parliament expressed its "views" on behalf of the State's Legislative Assembly and passed the Jammu and Kashmir Reorganization measure, 2019, meeting the necessary need for the measure to become law.

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<sup>4</sup> Proclamation No. G.S.R. 1223(E), dated 19th December, 2018, available at <http://egazette.nic.in/WriteReadData/2018/194042.pdf>.

<sup>5</sup> Declaration under Article 370(3) of the Constitution, G.S.R. 562(E), dated 6th August, 2019, available at <http://egazette.nic.in/WriteReadData/2019/210243.pdf>

<sup>6</sup> Rajya Sabha, Uncorrected Verbatim Debates, dated 5th August, 2019, available at <http://164.100.47.7/newdebate/249/05082019/Fullday.pdf> ; Lok Sabha, Text of Debate, dated 5th August, 2019, available at <http://loksabhadocs.nic.in/debatetextmk/17/1/05.08.2019f.pdf>

The aforementioned alterations raise four crucial legal inquiries:

- (A) Firstly, whether the President possesses the authority to lawfully modify Article 367, substituting the Constituent Assembly of the State with the Legislative Assembly of the State in the proviso to clause (3) of Article 370?
- (B) Secondly, whether the concurrence of the President in C.O. 272 and the recommendation of Parliament in C.O. 273 are legally valid considering the State of Jammu and Kashmir was under President's Rule?
- (C) Thirdly, does Parliament possess the constitutional mandate to partition the State of Jammu and Kashmir into two distinct Union territories during the period of President's Rule?
- (D) Fourthly, what is the scope of judicial intervention in such circumstances?

Subsequent sections of this paper endeavor to delve into each of these queries comprehensively, aiming to provide insightful answers.

### **Political-Coalition**

For the first time, the Bharatiya Janata Party (BJP) and the People's Democratic Party (PDP) forged a partnership to form a government in Jammu and Kashmir (J&K) in March 2015. This coalition marked a rare convergence of political ideals, even though it received significant support from Jammu for the BJP and the Kashmir valley for the PDP. Nonetheless, there were internal discussions over this coalition's viability. This coalition was created by the late PDP leader Mufti Mohammad Sayeed with the goal of addressing regional concerns and advancing a developmental agenda.

Mehbooba Mufti, his daughter, became the chief minister after his death. The PDP was divided within over whether or not to embrace the coalition, but some felt that abandoning Mufti's idea would weaken the party's base of support in the Valley. Some, however, argued that Mufti's vision should not be abandoned too soon but rather that its efficacy should be evaluated.

Following the BJP's withdrawal from the PDP alliance in June 2018, Governor Satya Pal Malik dissolved the legislative assembly in November of that same year. The state then implemented central rule in December 2018. The Bharatiya Janata Party (BJP) won a second term in office in India in May 2019. Former US President Donald Trump volunteered to mediate the dispute between India and Pakistan over Kashmir in July 2019. Prominent Kashmiri figures, like as former chief ministers Omar Abdullah and Mehbooba Mufti, were placed under house arrest on August 4, 2019. Large-scale meetings in public areas are forbidden by Section 144, and internet and mobile services were also limited.

Amit Shah, the home minister, suggested revoking Article 370 and Article 35A through a presidential order on August 5, 2019. Following that, J&K was divided into two union territories: Ladakh, which was run centrally, and J&K, which kept its legislature. There was a complete closure in the Kashmir valley, and opposition parties demonstrated within parliament.

### **Procedure used for removing Article 370**

On August 5, 2019, Home Minister Amit Shah presented the Jammu and Kashmir Reorganization Bill, 2019 in the Rajya Sabha, proposing to transform Jammu and Kashmir into two separate union territories: the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh. The bill suggested that the union territory of Jammu and Kashmir would retain a legislature, while Ladakh would not. It received overwhelming support in both houses of parliament, with 125 votes in favor and 61 against in the Rajya Sabha, and 370 votes in favor and 70 against in the Lok Sabha. Subsequently, the bill was signed into law by the President.

In the Rajya Sabha, Amit Shah announced the issuance of the Constitution (Application to Jammu and Kashmir) Order, 2019 (C.O. 272) under Article 370, replacing the 1954 order. C.O. 272 declared the application of all provisions of the Indian Constitution to Jammu and Kashmir, effectively abolishing the separate Constitution of Jammu and Kashmir. This order was issued with the "concurrence of the Government of State of Jammu and Kashmir", indicating the appointment of the Governor by the Union government.

Additionally, Presidential Order 2019 introduced clause (4) with four sub-clauses to Article 367 under "interpretations", clarifying the role of the Governor and the state government. The proviso to clause (3) of Article 370 was amended to substitute the "Constituent Assembly of the State" with the "Legislative Assembly of the State". This move was in line with past presidential orders issued under Article 370 during periods of President's rule, where the "concurrence of the state government" was interpreted to mean the Governor.

Following the presentation of the Presidential Order 2019 in the Rajya Sabha, Home Minister Amit Shah proposed a resolution recommending the rendering of all clauses of Article 370 inoperative under Article 370(3). After the resolution was adopted by both houses of parliament, Constitutional Order 273 was issued on August 6, 2019, replacing the existing text of Article 370.

### **Legislative Assembly as a Valid Successor to the Constituent Assembly of the State**

The issue of whether the Legislative Assembly of the State can be considered a valid successor to the Constituent Assembly of the State holds significant constitutional implications. It pertains to the process of amending or abrogating Article 370 and the extent of authority vested in the Legislative Assembly in the absence of a Constituent Assembly.

Article 370 of the Indian Constitution, with its proviso in clause (3), stipulates that any recommendation for amending or abrogating the article must come from the Constituent Assembly of the State. However, given that the Constituent Assembly of the State ceased to exist after the adoption of the Constitution, the question arises as to whether the Legislative Assembly can serve as a legitimate substitute.

This issue has been subject to legal interpretation and debate. Some argue that since the Constituent Assembly was dissolved without making any recommendation regarding the future of Article 370, the Legislative Assembly, as the elected representative body of the State, should have the authority to decide on matters concerning the article. They contend that the Legislative Assembly, being a democratic institution, represents the will of the people of the State and thus can exercise the powers envisaged under Article 370. On the other hand, opponents argue that the Constituent Assembly, being the body that negotiated the terms of accession and the special status of the State, holds unique constitutional significance. They maintain that the absence of

a specific recommendation from the Constituent Assembly implies the preservation of the status quo, requiring a new constitutional mechanism to amend or abrogate Article 370.

In interpreting the constitutional validity of the Legislative Assembly as a successor to the Constituent Assembly, courts may consider various factors, including the historical context, the intentions of the framers of the Constitution, and principles of democratic governance. Ultimately, the resolution of this issue will have far-reaching implications for the constitutional relationship between the Union and the State of Jammu and Kashmir.

### **Application of the Basic Structure Doctrine to Article 370**

The application of the Basic Structure Doctrine to Article 370 raises critical questions regarding its constitutional status and amendability. While some argue that Article 370 should be considered an immutable part of the Constitution due to its unique provisions, others contend that its removal is necessary for the integration and uniformity of the Indian federal system.

The Basic Structure Doctrine, as established in the Kesavananda Bharati case, asserts that while Parliament has the power to amend the Constitution, it cannot alter its core principles and essential features. However, the applicability of this doctrine to Article 370 is subject to debate, given its distinct nature and the mechanism of its enactment.

Article 370, which governs the relationship between the Union and the State of Jammu and Kashmir, has been argued to be integral to federalism. However, judicial precedents suggest that the asymmetric federalism provided by Article 370 does not necessarily constitute a basic feature of the Constitution. Asymmetric federalism, while present in other provisions like Article 371A and Article 371B, does not define the core essence of federalism as outlined in the Constitution.

Furthermore, the evolution of Article 370 over time, with numerous constitutional provisions extended to the State, indicates that its autonomy has been progressively diluted. This flexibility suggests that the power to decide the degree of autonomy lies with the elected representatives of Jammu and Kashmir, rather than being an immutable feature of the Constitution.

In light of these arguments, it can be contended that the abrogation of Article 370 would not necessarily violate the Basic Structure Doctrine, as it does not fundamentally alter the core principles of the Constitution. Instead, it aligns Jammu and Kashmir with the broader federal structure of India and allows for greater uniformity and integration.

Ultimately, the question of whether Article 370 should be considered part of the basic structure of the Constitution hinges on its interpretation in the context of federalism, autonomy, and the evolving relationship between the Union and the States.

### **Scope Of Judicial Review**

The scope of judicial review in the context of the abrogation of Article 370 and the reorganization of the State of Jammu and Kashmir involves a nuanced analysis of the decisions made by the President and the Parliament. While the Union of India contends that the desirability and wisdom of these decisions are not subject to judicial review, it is essential to understand the parameters within which the judiciary can intervene.

The judiciary has consistently held that it does not ordinarily interfere with matters of governmental policy unless they are found to be arbitrary, unreasonable, or in violation of

constitutional or statutory provisions. The courts recognize the principle that policy decisions are primarily within the domain of the executive and legislative branches of government. However, if a policy is found to be mala fide, unreasonable, or arbitrary, the judiciary may intervene.

In the context of Article 356, which deals with the imposition of President's rule in states, the Supreme Court has emphasized the importance of proportionality and reasonableness in the exercise of executive power. The court has held that excessive or disproportionate use of power by the President under Article 356 would be considered illegal, irrational, and mala fide.

Applying these principles to the present case, the judiciary may review the decisions to abrogate Article 370 and bifurcate Jammu and Kashmir to ensure that they are not arbitrary, unreasonable, or mala fide. The court may examine whether the actions of the President and the Parliament were necessary and proportionate in addressing the failure of constitutional machinery in the state. Additionally, the judiciary may assess whether the objectives of President's rule in Jammu and Kashmir could have been achieved without resorting to the abrogation of Article 370 and the reorganization of the state.

In summary, while the judiciary respects the prerogative of the executive and legislative branches in matters of policy, it retains the authority to review such decisions to ensure they adhere to constitutional principles and do not exceed the powers granted under the law.

### **the International Community Respond to the Abrogation of Article 370?**

#### **Pakistan and the Muslim World:**

Pakistan refused to acknowledge the supremacy of the Indian Constitution over Jammu and Kashmir.

The **Organization of Islamic Cooperation (OIC)** reiterated its call to reverse “all illegal and unilateral measures taken since 5th August 2019 aimed at changing the internationally recognized disputed status of the territory”.

#### **China:**

China said that it did not recognize the “**so-called union territory of Ladakh set up unilaterally and illegally by India**”, and the western section of the China-India border has always belonged to China. • **United States:**

It expressed **concern over detentions and restrictions in J&K**, but also called on all parties to maintain peace and stability along the **Line of Control**, including “**taking firm and resolute steps**” to combat cross-border terrorism. • **European Union:**

It called on **India and Pakistan to reopen dialogue**, and reiterated the grouping’s backing for a bilateral solution on Kashmir.

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#### **Russia:**

Russia **underlined that the changes were carried out “within the framework of the Constitution of the Republic of India”**. Moscow also stressed the “bilateral” nature of the J&K issue and mentioned the **Simla Agreement (1972)** and **Lahore Declaration (1999)**.

## **Formation of Article 370 and Jammu and Kashmir's Integration with India**

The formation of Article 370 and Jammu and Kashmir's integration with India were deeply intertwined with the unique historical and political circumstances surrounding the region's accession to the Dominion of India. Drafted as Article 306A and later adopted as Article 370, this provision underwent extensive deliberations in the Constituent Assembly to address the specific needs and concerns of Jammu and Kashmir.

Gopalaswami Ayyangar, a key figure in the Constituent Assembly, elucidated the rationale behind Article 370, emphasizing the exceptional nature of Jammu and Kashmir's accession compared to other princely states. He underscored the importance of replacing the instrument of accession with constitutional integration, recognizing the state's distinct historical background.

The Proclamation issued by Yuvraj Karan Singh on November 25, 1949, played a crucial role in solidifying Jammu and Kashmir's acceptance of the Constitution of India and aligning its constitutional relationship with the anticipated Union of India. By acknowledging the inclusion of Jammu and Kashmir's representatives in the Constituent Assembly, the proclamation nullified arguments asserting the state's retained sovereignty.

Furthermore, the establishment of an elected Constituent Assembly for drafting a constitution specific to the State of Jammu and Kashmir, as directed by Yuvraj Karan Singh's Proclamation on May 1, 1951, marked a significant milestone in the state's constitutional evolution. The assembly convened in October 1951, symbolizing a new phase in Jammu and Kashmir's journey towards constitutional governance.

Sheikh Abdullah's testimony before the Constituent Assembly provided crucial insights into the tumultuous circumstances surrounding Jammu and Kashmir's accession to India. He highlighted the invasion by Pakistani troops and tribesmen, emphasizing the people's united stand against the invaders despite the challenges faced by the state's defense and administrative machinery.

Sheikh Abdullah's address emphasized the multifaceted reasons supporting Jammu and Kashmir's accession to India, including democratic principles, secular democracy, and the potential for economic and land reforms aligned with India. He refuted arguments favoring accession to Pakistan based solely on religious grounds, advocating for a rational assessment of the diverse Muslim population residing in India.

Overall, the formation of Article 370 and Jammu and Kashmir's integration with India were complex processes shaped by historical events, political considerations, and the aspirations of the people of the region.

## **Constitutional Integration of Jammu and Kashmir with India**

The process of constitutional integration of Jammu and Kashmir with India has been a significant aspect of the historical trajectory of their association. This integration, as reflected in both the Indian Constitution and the Constitution of Jammu and Kashmir, underscores the surrender of sovereignty by the state.



The signing of the Instrument of Accession (IoA) by the Maharaja of Jammu and Kashmir in 1947 marked a partial relinquishment of sovereignty. However, it was Yuvraj Karan Singh's Proclamation in November 1949 that signified the complete surrender of sovereignty by the state.

A critical examination of constitutional provisions, particularly Article 1 of the Indian Constitution, further reinforces the integration of Jammu and Kashmir into the Union. The inclusion of Jammu and Kashmir as a Part III State, the application of Article 1 to the state reiterated by Article 370(1)(c), and Section 3 of the Constitution of Jammu and Kashmir, which unequivocally states the state's integral part in India, all nullify arguments asserting retained sovereignty.

Moreover, the adoption of the Constitution of Jammu and Kashmir by its Constituent Assembly in 1956 served to solidify this integration. The Preamble of the Constitution explicitly outlines its purpose as defining and strengthening the existing relationship of the state with the Union of India following its accession in 1947.

This reaffirms the state's status as an integral part of India and underscores that the relationship between Jammu and Kashmir and India was already established through the IoA, the Proclamation by Yuvraj Karan Singh, and crucially, the Constitution of India itself.

In essence, both constitutional frameworks—India's and Jammu and Kashmir's—conclusively indicate the complete and irrevocable integration of the state into the Union of India, dispelling any notion of retained sovereignty and affirming its status as an integral part of the Indian Republic.

## **Conclusion**

In conclusion, the abrogation of Article 370 underscores the ease with which majority will can dismantle established agreements. The BJP-RSS's communalization of Article 370 serves to invalidate the historic Instrument of Accession between Prime Minister Pt. Nehru and Maharaja Hari Singh, launching an attack on the state with a majority of Muslims and causing widespread consequences. The RSS's goal of creating a Hindu Rashtra is the driving force for the ruling political party's affiliation with the RSS, which runs counter to the Indian constitution's guarantees of religious freedom for all. Even though the Indian court is autonomous, it is clear that the BJP government has taken away that autonomy. Many of J&K's political leaders were imprisoned as a result of their inability to protect the state's special status. This judgment will go down in history as a betrayal of both the Kashmiri people's will and the Indian constitution.

Because of the case's significant consequences for intricate legal issues and policy, the Court's decision is eagerly awaited. It might put an end to the argument over whether Article 370 is still in effect even though Jammu and Kashmir's Constituent Assembly isn't there. The Court has to decide if and how Article 370(3) is still applicable. The Court's position on clause (3) will serve as a guide for future abrogation's of Article 370, even in the event that C.O. 272 is declared void. The Legislative Assembly of the State may be acknowledged as the legitimate heir of the Constituent Assembly in light of the example set by Maqbool Damnoo<sup>7</sup> and the idea of a living Constitution.

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<sup>7</sup> Mohd. Maqbool Damnoo v. State of Jammu and Kashmir, AIR 1972 SC 963.

In addition, the Court needs to clarify the boundaries and extent of the President's rule in order to clarify the relationship between the Center and the States under the federal system. Article 356 and the Constitution's quasi-federal structure give the Center the authority to make decisions while the President is in office, but these choices must respect the Constitution's bounds. During the President's administration, the President and Parliament took acts that went beyond these bounds and could not be justified. Therefore, it is essential that the state be restored to its original form and that Jammu and Kashmir's special status, as stipulated in Article 370, be restored.

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